

Dated: January 16, 2014
The following is SO ORDERED:




David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

ALI MAHER GARADA

Case No. 13-30214-K

Debtor.

Chapter 7

SSN: xxx-xx-6522

E & S USA, INC., dba
K & F BEAUTY SUPPLY,

Plaintiff,

vs.

Adv. Proc. No. 13-00442

ALI MAHER GARADA,

Defendant.

**MEMORANDUM AND ORDER RE "PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND/OR JUDGMENT ON THE PLEADINGS" COMBINED WITH RELATED ORDERS AND
NOTICE OF THE ENTRY THEREOF**

In this adversary proceeding the plaintiff, E & S USA., Inc., dba K & F Beauty Supply, seeks a nondischargeable judgment against the defendant, Ali Maher Garada, the above-named Chapter 7 debtor (“defendant” or “Mr. Garada”), under 11 U.S.C. § 523(a)(2), (4), and (6)¹ via a FED. R. BANKR. P. 7056 motion for summary judgment and/or a FED. R. BANKR. P. 7012(c) motion for judgment on the pleadings.

By virtue of 28 U.S.C. § 157(b)(2)(I), this is a core proceeding. The following shall constitute the court’s findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The relevant background facts and judicial and procedural histories may be briefly summarized as follows. Defendant, Mr. Garada, was employed by the plaintiff, E & S USA, Inc. to operate a business store that primarily sold cell phones and accessories. During this employment, Mr. Garada allegedly converted the store’s inventory and also cash-register cash receipts for his own purposes. As these allegations began to materialize, Mr. Garada’s employment ended.

On or about August 18, 2011, the plaintiff filed a “Civil Warrant” against Mr. Garada in the General Sessions Court of Shelby County, Tennessee seeking:

“... damages, including punitive damages, due to and proximately caused by Defendant’s breach of contract, conversion, trespass to chattels, unjust enrichment and/or money had and received as well as attorney fees, prejudgment interest, discretionary costs, and court costs in regard to items taken from the Plaintiff’s store in Shelby County, TN under \$25,000 Dollars (excluding attorney fees, if applicable).”

¹See 11 U.S.C. § 523(c).

Paragraph 6 of the plaintiff’s amended/corrected § 523(c) complaint filed on October 8, 2013 states: “This is an adversary proceeding in which the Plaintiff is seeking a determination as to the dischargeability and objecting to the Defendant’s discharge under Bankruptcy Code Section 523(a)(2), Section 523(a)(4), and Section 523(a)(6).” (emphasis added.) The “Plaintiff’s Response in Opposition to the Defendant’s Motion to Dismiss Complaint in Adversary Proceeding” filed on November 13, 2013, however, makes it clear and unambiguous that the plaintiff does NOT object to the defendant’s general discharge under 11 U.S.C. § 727(a) - only to the discharge of its particular debt.

On or about January 10, 2012, after a contested trial in the General Sessions Court, the plaintiff, represented by counsel, obtained a judgment against the defendant, acting pro se, for \$5,488.00 in compensatory damages and \$2,500.00 in punitive damages for a total judgment of \$7,988.00 plus costs and post-judgment interest.

The Honorable Deborah Henderson, Shelby County General Sessions Judge, stated in her oral bench ruling immediately following the trial, in relevant part, as follows:

All right. Based on the standard of preponderance of the evidence, more likely than not, this Court does find that the inventory taken by Mr. Garada at the beginning of his employment compared with the items that were missing at the end of his employment, and if they were under his sole control, as has been testified to, it is more likely than not that he is in some way responsible for their disappearance, either by negligence or - - has to be gross negligence, or by an intentional act.

So certainly, the Court will award the sum of \$4,975 for the missing items which represents the cost plus the profits that are missing from the store from those items. Now, additionally, we have quite a few of the sales receipts, which certainly indicate to the Court, that these receipts were done by the Defendant, because it has his cashier identification and there has been no proof presented to the Court that it was impossible to have made these entries that he wasn't at work at the time or no proof along those lines, so I will have to assume that they were, in fact, made by the Defendant. I am going through, as we speak now, trying to get an idea of what amount we have here, and once I do that, then I will give you a figure on that. This was intentional and there is no question about this being intentional, and it has caused damage to the Plaintiff. So the Court will consider punitive damages as a result...

It looks this totals about \$813....

So that \$813 added to \$4975 would be \$5448 in compensatory damages and I will add another \$2500 in punitive damages, so that a total of \$7,988, plus costs.

Defendant's appeal of the General Sessions Court judgment to the Shelby County Circuit Court was subsequently dismissed by the Honorable James F. Russell, Shelby County Circuit Court Judge, rendering the General Sessions judgment as final. The prepetition State court records are attached to the "Notice of Plaintiff's Supplementation of Record" that were filed by the plaintiff on January 10, 2014.²

On September 24, 2013, the defendant filed an original petition under Chapter 7 of the Bankruptcy Code. His Schedule F reflects, in relevant part, that the plaintiff holds a "Disputed Judgment from General Sessions Court" in the amount of \$7,988.00. The plaintiff thereafter timely filed the this adversary proceeding under 11 U.S.C. § 523(c) seeking to have its particular debt against the defendant determined to be nondischargeable.

On October 21, 2013, the plaintiff filed the instant motion for summary judgment pursuant to FED. R. BANKR. P. 7056 and/or a judgment on the pleadings pursuant to FED. R. BANKR. P. 7012(c). Plaintiff asserts, inter alia, that the "Final Order of Judgment" of the Shelby County, Tennessee, General Sessions Court should be given preclusive effect relying upon, for example, *In re Calvert*, 105 F.3d 315 (6th Cir. 1997);³ plaintiff also asserts that this court should concomitantly give full faith and credit in all respects to the final judgment of the General Sessions Court. 28

²The plaintiff's counsel has obtained and filed the State court records including a certified copy of the full transcript of the State court trial. See the plaintiff's "Notice of Plaintiff's Supplementation of Record" containing the following relevant documents:

1. A certified copy of the Shelby County, Tennessee General Sessions Court judgment rendered against the defendant on January 10, 2012, by the Honorable Deborah Henderson;
2. A certified copy of the order granting the plaintiff's amended motion to dismiss the defendant's appeal entered on December 14, 2012, by the Honorable James F. Russell, Shelby County, Tennessee Circuit Court Judge; and
3. The resulting 96-page original and authenticated trial transcript with exhibits from the Shelby County General Sessions Court trial presided over by Judge Henderson on January 10, 2012.

³See also *Grogan v. Garner*, 503 U.S. 638 (1992); *In re O'Rourke*, 167 B.R. 383 (D.C. N.D. Tenn.)(J/ Wiseman); cf. *Brown v. Felsen*, 442 U.S. 126 (1979).

U.S.C. § 1738.

On November 8, 2013, the defendant filed a motion to dismiss the plaintiff's § 523(c) nondischargeability complaint contending, among other reasons, that it fails to state a claim upon which relief can be granted. Defendant's motion to dismiss this adversary proceeding also was combined with a motion seeking attorney fees and expenses to be imposed against the plaintiff.⁴ Defendant also implies that because the General Sessions Court of Shelby County, Tennessee, is not a "court or record," the plaintiff's prepetition final judgment should not be afforded preclusive effect. On November 13, 2013, the plaintiff filed a response in opposition to the defendant's motion to dismiss the instant § 523(c) complaint primarily contending that the State courts of Tennessee would give preclusive effect to this prepetition final judgment rendered by the General Sessions Court in favor of the plaintiff against the defendant (and that this court should too).

"A federal [bankruptcy] court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Rally Hill Productions v. Bursack*, 65 F.3d 51, 53 (6th Cir. 1995) (quoting *Migra v. Warren City Sch. Dist. Bd of Educ.* 465 U.S. 75, 81 (1984)). Under Tennessee law "an unreversed judgment of General Sessions Court is as final as a judgment rendered in a court of record." *State v. McClintock*, 732 S.W.2d 268, 270 (Tenn. 1987). Moreover, a final judgment in the General Sessions Court bars a subsequent suit in another court on the same subject. *Clay v. Barraington Motor Sales*, 832 S.W.2d 33, 34 (Tenn. Ct. App. 1992) (citing *Staggs v. Vaughn*, 325 S.W.2d 277 (1959); see also *In re O'Rourke*, 169 B.R. 383 (M.D. Tenn. 1994).

In Tennessee, to invoke the doctrine of collateral estoppel, the party seeking reliance on this doctrine bears the burden of proof on all the following five essential elements:

⁴Interestingly, both parties reliance on 11 U.S.C. § 523(d) is misplaced regarding their respective requests to impose attorney fees against each other. Since the claim in question is not a "consumer debt" as defined in 11 U.S.C. § 101(8), the defendant's motion for attorney's fees must be denied. Likewise, the plaintiff's request for attorney's fees also must be denied because creditors are not beneficiaries of this subsection and further the debt is not, as noted, a "consumer debt."

1. that the issue sought to be precluded is identical to the issue decided in the earlier suit;
2. that the issue sought to be precluded was actually litigated and decided on its merits in the earlier lawsuit;
3. that the judgment in the earlier suit has become final;
4. that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit; and
5. that the party against whom collateral estoppel is asserted has a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded.

Trinity Industries, Inc. v. McKinnon Bridge Co., Inc., 147 S.W.3d 225, 232-33 (Tenn. Ct. App. 2003) (citing *Beatty v. McGraw*, 15 S.W.3d 819, 824-25 (Tenn. Ct. App. 1998) and *Dickerson v. Godfrey*, 825 S.W.2d 692, 694-95 (Tenn. 1995)).

Having considered the entire prepetition State court record and the Chapter 7 case and instant adversary proceeding records as a whole including all the prepetition and postpetition pleadings, the court determines, regarding the issues of liability and damages, that the plaintiff indeed has carried the required burden of proving all five of these essential elements as preconditions to invoke the doctrine of collateral estoppel on the issues of liability and damages. Accordingly, the defendant's motion to dismiss the adversary proceeding is denied. The transcript of General Sessions Court Judge Henderson's transcribed oral bench ruling and the subsequent General Sessions Court judgment fully addressed the issues of liability and damages that essentially are identical to those before this bankruptcy court in this instant adversary proceeding. By virtue of 28 U.S.C. § 1334(b), the State court has concurrent jurisdiction over such civil proceedings. As noted earlier, the General Sessions Court judgment was appealed to the Shelby County, Tennessee Circuit Court, and the appeal was later dismissed and remanded to the General Sessions Court. The General Sessions Court judgment has since become final.

Regarding the issues of liability and damages, the pleadings are clear that the parties and issues in the instant adversary proceeding are the same that existed in the prepetition lawsuit before the General Sessions Court and that the defendant had a full and fair opportunity in the prepetition lawsuit to litigate all the issues that are essentially identical to the issues raised in the instant adversary proceeding under § 523(c) of the Bankruptcy Code.

For the foregoing reasons, this court, considering a totality of the particular facts and circumstances and applicable law including the State court record and all the pleadings, triggers, in part, the doctrine of collateral estoppel (*i.e.*, issue preclusion) and concomitantly gives full faith and credit to the plaintiff's prepetition final judgment of the General Sessions Court concerning the issues of liability and damages. Accordingly, the plaintiff's instant motion for summary judgment and/or judgment on the pleadings is granted, in part, regarding the issues of liability and damages in the aggregate amount of \$7,988.00.

Having addressed, in part, the plaintiff's motion for summary judgment and/or judgment on the pleadings, the court now focuses and addresses the ultimate dischargeability issues under § 523(c) of the Bankruptcy Code. By virtue of § 523(c) of the Bankruptcy Code, the bankruptcy court has exclusive jurisdiction to determine the dischargeability of particular debts. How much, if any of the \$7,988.00 in damages should be discharged. Similar to the issues of liability and damages, the court must examine all the pleadings and the five elements of collateral estoppel to determine if the doctrine should be applied to the determinations of nondischargeability under § 523(a)(2), (4), and (6) of the Bankruptcy Code – in full or in part. The crucial element the court must address regarding dischargeability is whether the issues before the General Sessions Court are identical to the issues before this court under § 523(a)(2), (4), and (6). The other four elements under the doctrine of collateral estoppel appear to have been sufficiently satisfied: the judgment is final; the parties are the same; and the parties actually litigated the issues resolved in the General Sessions Court.

The issues plead and decided in the General Sessions Court regard Tennessee law for “breach of contract, conversion, trespass to chattels, unjust enrichment and/or money had and received.”⁵ Under § 523(c) of the Bankruptcy Code, a debtor’s debts are excepted from the general discharge if they were, for example, obtained by false pretenses, false representation, or actual fraud (§ 523(a)(2)(A)); for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny (§ 523(a)(4)); and for willful and malicious injury by the debtor (§ 523(a)(6)). Ordinarily, the Tennessee law claims decided in the General Sessions Court are not necessarily identical to § 523(a)(2), (4), and (6).⁶ Specifically here, breach of contract, trespass to chattels, unjust enrichment, and/or money had and received do not appear to give rise to statutory exceptions to discharge involving § 523(a)(2), (4), and (6) actions – leaving only conversion.

Conversion under Tennessee law is the appropriation of another’s property to one’s own use and benefit by the exercise of dominion over it, in defiance of the true owner’s rights. *Paehler v. Union Planters Nat. Bank*, 971 S.W.2d 393 (Tenn. App. 1997) (citing *Mammoth Cave Prod. Credit Ass’n v. Olham*, 569 S.W. 2d 833, 836 (Tenn. App. 1977); see also *Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965); *Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F.Supp.2d 593, 613 (W.D. Tenn. 2011); *Kinnard v. Shoney’s, Inc.*, 100 F. Supp.2d 781, 797 (M.D. Tenn. 2000). Conversion under Tennessee law may be innocent or technical and not necessarily done to defraud or with willful or malicious intent. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934). For collateral estoppel to apply for dischargeability purposes, the General Sessions Court must make the additional finding that the conversion occurred in such a manner as to render it nondischargeable under § 523(a)(2), (4), and (6).

Here, the General Sessions Court determined that the compensatory damages totaling \$4,975.00 for the missing inventory was more likely than not caused by the defendant, Mr.

⁵See the quotation from the plaintiff’s Civil Warrant at pages 2.

⁶See *Grogan v. Garner*, 498 U.S. 279 (1991) (standing for the idea that state law claims are not necessarily the same as federal bankruptcy law nondischargeability claims nor subject to the same evidentiary standards).

Garada, either by “negligence, . . . gross negligence, or by an intentional act.”⁷ Furthermore, Judge Henderson held that the damages of \$813.00 for the cash register transactions were “intentional” and further stated “[t]here is no question about this being intentional.”⁸ It is expressly noted that the \$2,500.00 in punitive damages were awarded for the intentional nature of the cash register transactions.

Considering all the pleadings, this court finds that issues litigated in the General Sessions Court regarding the missing inventory damages totaling \$4,975.00 are not necessarily identical to determinations of dischargeability under § 523(a)(2), (4), and (6). Nothing in the record indicates the missing inventory was caused by anything other than possibly the mere negligence, gross negligence, or an intentional act of Mr. Garada. There is no evidence of any actions that fall under § 523(a)(2), (4), and (6) because the General Sessions Court’s findings did not go that far; it only found that the missing inventory was due to Mr. Garada’s negligence, gross negligence, or intentional acts. Therefore, collateral estoppel does not apply to the determination of dischargeability of the \$4,975.00 (discussed above). The bankruptcy statutory and requisite requirement of willfulness, maliciousness, and fraud, however, are missing.

Regarding the cash register transactions and the resulting \$813.00 for compensatory damages and \$2,500.00 for punitive damages, the General Sessions Court made the additional finding that the actions were “intentional.” Mr. Garada intentionally converted cash receipts for his own purposes and caused the transactions to be zeroed-out or discounted from the actual sales price. Essentially, Mr. Garada personally pocketed the cash register receipts without showing a cash register deficit by intentionally pricing the goods he sold for nothing or at an extreme discount. The cash register receipts were stamped with Mr. Garada’s employment ID as well as the date and time that the transaction took place. The General Sessions Court conclusively found that Mr.

⁷See supra footnote 2.

⁸See supra footnote 2.

Garada intentionally converted the cash register receipts and tried to cover it up by fraudulently misreporting the cash register transactions.

This court finds that the cash register transactions damages of \$813.00 and the related punitive damages of \$2,500.00 that arise out of the cash register transactions are nondischargeable under § 523(a)(4) and (6) but not under § 523(a)(2). For purposes of § 523(a)(2), Mr. Garada's actions did not result in him obtaining money or property by false pretenses, false representations, or actual fraud because the plaintiff, E & S USA, Inc., did not rely on any representation by Mr. Garada that caused the company to turnover monies to Mr. Garada. Instead, Mr. Garada acted unilaterally to appropriate the cash receipts against the desire of the plaintiff, E & S USA, Inc. Mr. Garada's actions more appropriately fall under § 523(a)(4) for embezzlement and also § 523(a)(6) for a willful and malicious injury.

Under § 523(a)(4), a "creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *In re Bucci*, 493 F.3d 635, 644 (6th Cir. 2007) (quoting *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir.1996)). Here, Mr. Garada was entrusted by the plaintiff, E & S USA, Inc., to manage and operate the store and the cash register. While so entrusted, he appropriated the cash receipts for his own purposes and fraudulently misreported the cash register transactions as zeroed-out or discounted. These findings by the General Sessions Court make the intentional conversion of the cash receipts under Tennessee law fit perfectly into the federal law definition of § 523(a)(4) embezzlement.

Section 523(a)(6) of the Bankruptcy Code requires a judgment to be for an injury that is both willful and malicious. The absence of one creates a dischargeable debt." *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999). Section 523(a)(6) in essence applies "tort" language when it requires an actor to intend the consequences of his act or believe that the consequences are substantially certain to result. *Id.* at 464 (citing Restatement (Second) of Torts § 8A, at 15 (1964)).

Willful and malicious requires a showing beyond mere recklessly or negligently inflicted injuries. *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 61 (1998). Here, Mr. Garada's intentional conversion was both willful and malicious. By converting the cash receipts for his own purposes and intentionally depriving the plaintiff, E & S USA, Inc., of its property, Mr. Garada committed a willful and malicious injury to the plaintiff, E & S USA, Inc. Therefore, the findings by the General Sessions Court make the intentional conversion of the cash receipts under Tennessee law also fit within the § 523(a)(6) definition.

Based on the foregoing, **IT IS ORDERED AND NOTICE IS HEREBY GIVEN** that the plaintiff's Motion for Summary Judgment and/or Judgment on the Pleadings is granted in part and denied, in part, as follows:

1. The doctrine of collateral estoppel and the full faith and credit statutory provisions apply to the General Sessions Court judgment regarding the disputed liability and damage amount of \$7,988.00 and result in an allowed aggregate claim for the plaintiff of \$7,988.00;
 2. That the doctrine of collateral estoppel applies for purposes of § 523(c) determinations of dischargeability regarding the damages for the cash register transactions totaling \$813.00 for compensatory damages and \$2,500.00 for punitive damages, and results in the \$3,313.00 being determined to be nondischargeable under § 523(a)(4) and (6) but not § 523(a)(2);
 3. That consideration of all the pleadings require a conclusion that the doctrine of collateral estoppel does NOT apply for purposes of § 523(a)(2), (4), and (6) determinations of dischargeability regarding the compensatory damages from the missing inventory totaling \$4,975.00 and results in this amount being determined to be dischargeable;
 4. Defendant's motion to dismiss the adversary proceeding is denied;
 5. The parties' request to impose attorney fees against each other under § 523(d) is denied;
- and

6. The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following entities:

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